

CREDIT CORP. (M) BHD.

a

v.

FONG TAK SIN

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH SCJ
[SC CIVIL APPEAL NO. 02-88-1990]
24 JANUARY 1991

b

LIMITATION: *Personal injury - Application to add new party after expiry of limitation period - Date of knowledge of who was registered owner of vehicle - When cause of action accrues - Postponement of period of limitation - Fraud or mistake - Whether knowledge relevant - Limitation Act 1953, ss. 6(1)(a), 24, 29.*

c

As a result of an accident between a taxi and a bus on 18 June 1979, the respondent (R), who was the driver of the taxi, was injured. R claimed special and general damages and also filed another civil suit in respect of the same accident. On 5 March 1984, the former solicitors for R received a letter from the solicitors acting for the driver and owner of the said bus. There was also a letter dated 15 August 1984 from solicitors for the appellant (A) to the former solicitors for R whereby they advised that they were acting for the 2nd defendant D2 and A, who were the owners of the bus which was let out on hire-purchase at the time of the accident.

d

R's present solicitors, on 20 February 1989, filed a summons-in-chambers for leave to amend the writ of summons and statement of claim and to add A as the third defendant in the civil suit and that R be granted 30 days to file third party proceedings.

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The learned trial Judge held that since R became aware that A was the registered owner only on 15 August 1984, time runs from this date and not the date of the accident. A appeals from that ruling.

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The issue for the Court was whether R's application was barred by limitation under the Limitation Act 1973 (the Act).

Held:

[1] Based on established authorities the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

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[2] (a) The trial Judge in the instant case fell into error firstly on the reference to the date on which the respondent became aware of the identity of the appellant assuming that knowledge is a relevant issue.

(b) According to the letter dated 15 August 1984 the respondent became aware of A's existence not on the date of the letter but on the date earlier to that as referred to in the letter, that is, 5 March 1984.

h

[3] (a) By virtue of s. 29 of the Act, in cases of fraud or mistake, the period of limitation is postponed and does not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it;

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- a** (b) s. 29(1)(c) of the Act is only applicable where the mistake is an essential ingredient of the cause of action;
- (c) knowledge on the part of the respondent as to the identity of the appellant is irrelevant as such requirement is not provided for in the Malaysian statute of limitation.
- b** [4] An application to add or substitute a new party to an action after the expiry of the limitation period should not be allowed on good and sound principles.
- [5] On 18 June 1979 there was undoubtedly in existence someone who can sue, that is, the respondent. There was also undoubtedly some person in existence who can be sued, amongst them the appellant. On the same date there was also in existence the facts to be proved by the respondent to entitle the plaintiff to succeed in the action.
- c** [6] The doctrine of limitation is based
- (a) firstly on a presumption that a right not exercised for a long time is non-existent and
- (b) secondly, that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
- d** [7] The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation.
- [Appeal allowed.]*

Cases referred to:

- e** *Cooke v. Gill* [1873] LR 8 CP 107
- Ketteman v. Hansel Properties (HL (E))* [1987] 2 WLR 312
- Lim Kean v. Choo Koon* [1970] 1 MLJ 158
- Phillips-Higgins v. Harper* [1954] 1 QB 411
- Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 AC 1
- Phua Chin Chew & Ors. v. K.M. Ors.* [1987] 2 MLJ 604
- R.B. Policies at Lloyd's v. Butler* [1950] 1 KBD 76
- f** *Read v. Brown* [1888] 22 QBD 128

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), 29

Limitation Act 1980 [UK], s. 11

Other sources referred to:

- g** *Halsbury Laws of England*, 2nd Edn., Vol. 20, p. 618
- Halsbury's Statutes of England and Wales*, 4th Edn., Vol. 24
- For the appellant* - D.P. Naban; M/s. Skrine & Co.
- For the respondent* - Sukhdev Singh; M/s. Sukhdev Singh & Co.

JUDGMENT

h Hashim Yeop A. Sani CJ (Malaya):

There was a motor accident along the 77th milestone Ipoh/Kuala Lumpur main road on 18 June 1979 between motor vehicle taxi No. H5887 and another motor vehicle, a bus No. JAB 980. The respondent was injured in the accident. On 16 June 1984 the respondent, as driver of the taxi, took out a writ claiming for special and general damages.

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There was also another civil suit filed in Kuala Lumpur, Kuala Lumpur Civil Suit C38/82 in respect of the same accident. On 5 March 1984 the former solicitors for the respondent received a letter from the solicitors acting for the driver and owner of the said bus in the Kuala Lumpur civil suit who are now solicitors for the appellant.

In fact a number of letters were sent by the solicitors for the appellant to the former solicitors for the respondent but for the purpose of this judgment only one is really relevant. The letter appears at p. 21 in appeal record dated 15 August 1984 and reads as follows:

Skrine & Co.,
Advocates & Solicitors,
Straits Trading Building,
No. 4, Leboh Pasar Besar,
50050 Kuala Lumpur

TT/m/90713.T/84

GS/GAP.A.1648/80

15 August 1984

M/s. Gurdial Singh & Co.
29, 1st Floor
Station Road
Ipoh,
Perak

Dear Sirs,

Re: Kuala Lumpur High Court. Civil Suit No. C38 of 1982

We refer to your letter dated 8 August 1984.

We have no instructions to act for the 1st defendant whom your client allege in the statement of claim is the owner of motor vehicle JAB 980. When we wrote to you on 3 August 1984 stating that we have instructions to accept service of process we had in mind the 2nd defendant and Credit Corporation (M) Bhd, who are the owners of the vehicle which was let out by them on hire purchase at the time of the accident.

We hope to serve you with the notice of appearance on behalf on the 2nd defendant shortly.

Yours faithfully,

c.c. client

It is clear in that letter that on 3 August 1984 the solicitors for the appellant had instructions to accept service of process in respect of the appellant being the owners of the vehicle let out on hire purchase at the time of the accident.

The respondent's previous solicitor passed away on 22 November 1988.

The present solicitors for the respondent filed a summons-in-chambers dated 20 February 1989 to apply for the following orders:

- (a) leave to amend the writ of summons and statement of claim as set out in the draft amended writ of summons;
- (b) liberty to add appellant as third defendant in the civil suit; and
- (c) the respondent be granted 30 days from the date of the order to file third party proceedings.

a When the application went before the learned Judge there was no dispute as to the primary facts. The learned Judge found that the only issue before him was an issue of law whether the respondent's application was out of time, that is to say, barred by limitation.

b Before the learned Judge it was argued on behalf of the appellant that the six years period of limitation had already lapsed as the accident occurred on 18 June 1979. The learned Judge was of the opinion however as stated in his grounds of judgment that since the respondent became aware that the appellant was the registered owner of the vehicle on 15 August 1984, that is the date of the letter reproduced earlier, and not before that, time did not run from the date of the accident but only from the date that the respondent became aware of the "involvement of the third defendant" that is on 15 August 1984.

Section 6(1)(a) of our Limitation Act 1953 (Revised 1981) provides *inter alia* that:

c **Save as hereinafter provided** actions founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. (Note emphasis)

d That provision invites the question as to what is the date on which the cause of action accrued. In *Cooke v. Gill* [1873] LR 8 CP 107 Brett J defined "a cause of action" to mean "every fact which is material to be proved to entitle the plaintiff to succeed." This definition was subsequently approved by the Court of Appeal in *Read v. Brown* [1888] 22 QBD 128. After reviewing the authorities Yong J in *Lim Kean v. Choo Koon* [1970] 1 MLJ 158 came to the conclusion that the period of limitation does not begin to run "until there is a complete cause of action". In that case he held that the plaintiff's cause of action was not complete until an order is obtained from the Rent Assessment Board fixing the amount of the rent legally recoverable under the Control of Rent Ordinance. He accordingly held that the period of limitation commenced to run only from the date of the order of the board.

e From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

f The trial Judge considered the background facts of this case and he made several findings. He found that the previous solicitors for the respondent had done a search with the RIMV for particulars but failed to find anything useful. The Judge also found that after several letters to the RIMV the reply from the RIMV still stated that the first defendant was the registered owner. It was only from 3 August 1984 that a letter was received from the solicitors for the appellant which was referred to in the letter reproduced earlier in the judgment.

g In our view the trial Judge in the instant case fell into error firstly on the reference to the date on which the respondent became aware of the identity of the appellant assuming that knowledge is a relevant issue. According to the letter reproduced earlier in the judgment the respondent became aware not on the date of the letter but on the date earlier to that as referred to in the letter, that is, 5 March 1984. Secondly the learned Judge was in error as to the law of limitation to be applied in this case.

h Section 11 of the 1980 English Limitation Act provides for special time limit for actions in respect of personal injuries. That section applies to any action of damages for negligence, nuisance and breach of duty. The relevant provisions of that section read as follows:

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

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- (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below. **a**
- (4) Except where subsection (5) below applies, the period applicable is three years from:
 - (a) the date on which the cause of action accrued; or
 - (b) the date of knowledge (if later) of the person injured. **b**
- (5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of s. 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from:
 - (a) the date of death; or
 - (b) the date of the personal representative's knowledge; whichever is the later. **c**

We have no equivalent of s. 11 of the English Limitation Act 1980 in our law. Section 24 of our Act is a provision safeguarding the position of persons under legal disability - (see *Phua Chin Chew & Ors. v. K.M. Ors.* [1987] 2 MLJ 604. By virtue of s. 29 of our Act in cases of fraud or mistake the period of limitation is postponed and does not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it. **d**

A perusal of the appeal record here shows that there is a reference to s. 29 in the submission of Counsel for the respondent appearing in the notes of proceedings but this section is not however referred to in the grounds of judgment. The line of argument before the learned Judge was probably that the respondent's mistake was caused by the negative response from the RIMV. But s. 29 of the Limitation Act cannot apply to this case for the following reasons. **e**

Section 29 of our Limitation Act is in *pari materia* with s. 26 of the old English Limitation Act of 1939 and the relevant part reads as follows:

29. Where, in the case of any action for which a period of limitation is prescribed by this Act, either: **f**

- (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it. **g**

This provision was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise be running against him, unknown to him. As a general rule as stated in the notes in *Halsbury's Statutes of England and Wales* (4th Edn.) Vol. 24 to s. 32 of the English Limitation Act 1980 (which is in *pari materia* with s. 26 of the English Limitation Act 1939 which is in turn in *pari materia* with s. 29 of our Limitation Act 1953) it is stated that s. 29(1)(c) applied "to an action at common law to recover money paid under a mistake of fact or to an analogous claim in equity for money paid under a mistake of fact or law". **h**

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- a** The provision of s. 29(c) of our Limitation Act is therefore only applicable where the mistake is an essential ingredient of the cause of action. This is explained by Pearson J in *Phillips-Higgins v. Harper* [1954] 1 QB 411 at p. 418 when considering the corresponding section in the English law:

- b** What, then, is the meaning of provision (c)? The right of action is for relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of actions where a mistake has been made which has had certain consequences and the plaintiff seeks to be relieved from those consequences. Familiar examples are, first, money paid in consequence of a mistake: in such a case the mistake is made, in consequence of the mistake the money is paid, and the action is to recover that money back. Secondly, there may be a contract entered into in consequence of a mistake, and the action is to obtain the rescission or, in some cases, the rectification of such a contract. Thirdly, there may be an account settled in consequence of mistakes; if the mistakes are sufficiently serious there can be a reopening of the account.
- c**

In *R.B. Policies at Lloyd's v. Butler* [1950] 1 KBD 76 Streatfield J explained the rationale of s. 26 of the English Act as follows:

- d** This section was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise have been running against him, unknown to himself. But for the section, time would have run against him from the accrual of his right of action, for it is to be noted that the section, even in the case of fraudulent concealment, does not say that the cause of action shall not accrue until the fraud is discovered, but simply that "time shall not "begin to run" until that event.

- e** *It is to be noted that s. 26 is the only provision in the Limitation Act 1939, in which a special exception of that nature is made. Nowhere is it to be found that where a person, who otherwise has a perfect cause of action, cannot pursue it because the defendant is unknown, time does not run.* And it seems to me, therefore, that *prima facie* as soon as there is a cause of action (as there clearly was in the present case the moment the motor car was stolen) time begins to run notwithstanding the fact that the plaintiff is ignorant of the identity of the defendant. (Note emphasis)

- f** *R.B. Policies at Lloyds v. Butler* dealt with an action for conversion. A car was stolen in 1940 and the identity of the thief was not known and the car was not traced until 1947. The plaintiffs (successors in title to the owner of the car) then brought an action against the defendant, an innocent purchaser for value of the car, for its recovery. The defendant relied on the Limitation Act 1939. Streatfield J began his judgment by asking the question "When does a cause of action accrue?" He said at p. 79:

- g** When the thief, whoever he was in the present case, stole the motor car in 1940 he clearly converted it to his own use, and apart from the question of prosecution for the felony, if he had then been known, an action could undoubtedly have been brought against him for conversion of the car. There being thus a cause of action, I have to determine whether it is necessary that there should be an actual known and available defendant to such an action before it can be said that the cause of action has accrued within the meaning of s. 2, subsection I, and s. 3, subsection I, of the Limitation Act.
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- i** Various definitions have been made of an accrual of a cause of action, and I start with the proposition in *Halsbury Laws of England*, 2nd Edn., Vol. 20, p. 618, which has been submitted by Mr. Atkinson: "A cause of action cannot 'accrue unless there be a person in existence capable of suing and another person in existence who can be sued'. In the present case there was, of course, a person capable of suing, but was there another in existence who could be sued?"

Is it to be said that because a person is, possibly only temporarily, untraceable, he is not in existence, or cannot be sued? Whoever the thief was, if he had been traceable, he could have been sued: so I doubt whether it can be said that there was no person in existence, for the purpose of that definition, who could have been sued.

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Knowledge on the part of the respondent as to the identity of the appellant is irrelevant as such requirement is not provided for in our statute of limitation. This is the second error made by the learned Judge.

b

An application to add or substitute a new party to an action after the expiry of the limitation period should not be allowed on good and sound principles.

Lord Keith of Kinkell in *Ketteman v. Hansel Properties (H.L.E.)* [1987] 2 WLR 312 referred to an old rule of practice at p. 320. His Lordship said:

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It has long been a rule of practice that amendment should not be allowed for the joinder of an additional defendant in a situation where a relevant period of limitation has already expired in relation to the cause of action against him. The reason for that rule of practice is, however, debatable. One theory is that an additional defendant, joined unconditionally, becomes a party to the action as from the date of issue of the writ against the original defendant, that is to say, that joinder is related back to that date. That being so, it would be unjust to join him as a defendant at a time when limitation has run in his favour, because to do so would have the effect of depriving him of a valid defence.

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In *Ketteman* the original action was by some house owners against the builders for structural defects in their houses they had purchased from the builders. The action was commenced in the middle of 1980. Nearing the middle of 1981 the builders issued a third party notice to the District Council concerned claiming indemnity or contribution. The Council denied the allegations and towards the latter part of 1981 issued a fourth party notice to the architects concerned claiming indemnity or contribution on the grounds of negligence in the design of the foundations of the houses. In the middle of 1982 the house owners issued a summons for leave to join the said District Council and the said architects as defendants to the action. The delays were the “unfortunate vicissitudes” referred to by Lord Keith of Kinkell.

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The action was based on contract and in tort. The House of Lords in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 AC 1 held that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or could with reasonable diligence have been discovered.

f

The House of Lords in its examined the real reason for the old rule of practice in refusing amendment for the joinder of an additional defendant where the relevant period of limitation had already expired. The House of Lords looked at two different theories for that rule of practice. The first theory was called the “relation back” theory in that the additional defendant becomes a party to the action as from the date of the issue of the writ against the original defendant. According to this theory it would be unjust to allow the joinder of the additional defendant at the time when the limitation had run in his favour because to do so would have the effect of depriving of his right of a valid defence.

g**h**

The second theory is called the “no useful purpose theory”, because no useful purpose would be served by joining an additional defendant when the limitation had already run in his favour because he was not to be deemed to have become a party at an earlier date than the actual date of joinder and therefore would have an unanswerable defence to the plaintiff’s claim.

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a Their Lordships in *Ketteman* held the view that the true basis of the old rule of practice is the second theory, that is the “no useful purpose” theory.

As stated earlier a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In the present case on 18 June 1979 there was undoubtedly in existence someone who can sue, that is, the respondent. There was also undoubtedly some person in existence who can be sued, amongst them the appellant. On the same date there was also in existence the facts to be proved by the respondent to entitle the plaintiff to succeed in the action.

b

The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

c

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the State there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the Courts.

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The appeal is accordingly allowed with costs here and below.

Also found at [1991] 2 CLJ 871

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